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Before the
Federal Communications Commission
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of	)	
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Reasonable and Nondiscriminatory	)	
Licensing of Patents Essential to	)	RM-_____
Implementation of Mandatory Digital	)	
Television Standards	)	
	)	
	)	

To: The Office of the Secretary
The Commission

PETITION FOR RULEMAKING AND
REQUEST FOR DECLARATORY RULING

Coalition United to Terminate Financial
Abuses of the Television Transition LLC

2 January 2009

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Summary

Compared to the digital television ("DTV") patent licensing process elsewhere in the world, licensors in the United States operate freely in an un-regulated "Wild West" without supervision or accountability. As a result, American consumers pay $20 to $30 per television for intellectual property rights that cost about $1 elsewhere in the world. ***American consumers will purchase more than 45 million DTVs and will be overcharged more than one billion dollars in the crucial digital transition years of 2008 and 2009 alone.*** Even as the U.S. economy continues to suffer and policy makers try to support domestic companies, the great majority of those windfall profits will be exported to foreign companies. These excessive patent costs hit the poorest Americans the hardest and place hugely disproportionate burdens on Americans that rely on free over-the-air broadcasting to watch television.

With the best of intentions, the FCC created the conditions that permit modern day robber barons, including several classic "patent trolls," to hold American consumers hostage to outrageous royalty demands. The FCC ignored warnings that its DTV standard was bloated with specifications and patents far beyond those required for basic functioning and compatibility. It adopted the "ATSC" standard in full in 1996, simply incorporating the standard by reference without even knowing who held underlying patents or how much consumers would have to pay over to patent holders. Since then, the FCC has required even more proprietary technology to be incorporated into American DTV sets.

The FCC acknowledged the potential for abusive patent licensing practices when it adopted the entire ATSC standard by reference, but it chose to rely on *ad hoc*

enforcement rather than a specific regulatory framework to protect American consumers. Still, the Commission warned that reasonable and nondiscriminatory ("RAND") patent licensing is the law, and promised that "if a future problem is brought to our attention, we will consider it and take appropriate action."

It is now time for the FCC to make good on its promise. The Coalition United to Terminate Financial Abuses of the Television Transition LLC ("CUT FATT") petitions the FCC to declare immediately that it will impose the same fines on companies abusing RAND licensing obligations that it has imposed in connection with violations of other DTV transition rules. The FCC should also adopt rules to curb future abuses. So far, the FCC has not lived up to its commitment to enforce its RAND licensing requirements, and Americans are paying a stunning price tag – more than $1 billion in excess royalties in the digital transition years of 2008 and 2009 alone. Instead of taking "appropriate action," the FCC has turned a blind eye to vast overreaching. In responses to questions posed earlier this year by Senator John Kerry, Chairman Kevin Martin conceded that the FCC is shockingly ignorant of the technology the government forces Americans to buy:

- The Commission does not know how many patents are required by "the numerous technologies used in the Advanced Television Systems Committee (ATSC) standard" (but it acknowledges, "[a]t least 17 ATSC participants assert ownership of essential patents which may amount to thousands of claims in hundreds of patents").

- The Commission does not know who holds patents for the standards it has adopted or how much those patent holders charge DTV set makers (and ultimately consumers) for patent licenses.

- The Consumer Electronics Association and several other parties have alerted the FCC to problems involving DTV patent licensing practices, but the FCC has not yet taken any action to investigate alleged abuses or impose appropriate remedies.

A government that creates a mandatory standard and then forces its citizens to buy tens of millions of digital televisions and receivers using proprietary technology quite

plainly has a responsibility to protect those citizens from uncontrolled price gouging that the government itself enabled. With more than 62,000 DTV sets sold every day, the total cost of rampant overcharging has already dwarfed the entire transition subsidy provided through the National Telecommunications and Information Administration converter box program. The abuse will continue unless and until the FCC acts.

CUT FATT asks that the FCC immediately take two steps to protect consumers from abusive ATSC patent licensing practices. First, it should declare that ATSC royalty demands that exceed international comparables are presumed to violate the FCC's RAND requirements, and that each patent holder with higher fees has the burden of proving that its proposed license fees are reasonable and non-discriminatory. Second, the FCC should initiate a rulemaking proceeding to adopt appropriate rules to protect consumers. The Commission should encourage all prospective "essential" patent licensors to form a license pool, and it should review the pool's licensing terms to determine whether they are reasonable and nondiscriminatory based on international comparables. This approach assures a "light touch" regulatory environment, allowing patent holders to earn a fair return while imposing safeguards against price gouging and other abuses of American consumers.

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To: The Office of the Secretary
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PETITION FOR RULEMAKING AND
REQUEST FOR DECLARATORY RULING

The Coalition United to Terminate Financial Abuses of the Television Transition LLC ("CUT FATT")[1] hereby submits this petition for rulemaking pursuant to Section 1.401 of the FCC's rules, 47 C.F.R. § 1.401, and request for declaratory ruling pursuant to Section 154(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i). This petition asks the FCC to modify its rules and policies governing licensing of patents that are essential to implementation of the Commission's digital television standards.[2] The request for declaratory ruling asks the FCC to declare that it will treat violations of its existing patent licensing requirements according to the same forfeiture principles it has applied to other digital transition related violations.

Two aspects of the Commission's orders adopting a digital television standard have created an environment of rampant profiteering by a large and ever-expanding

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[1] CUT FATT members include VIZIO, Inc. ("VIZIO") and Westinghouse Digital Electronics, Inc. ("WDE"), independent manufacturers of digital televisions.

[2] For purposes of this Petition for Rulemaking and Request for Declaratory Ruling only, CUT FATT assumes and accepts *arguendo* the many allegations of patent essentiality made by parties claiming to control DTV technologies. This assumption is expressly made without prejudice to any contention otherwise in this or any other proceeding and with the express understanding that there is no admission of essentiality with respect to any patent.

group of companies that claim to own patents needed to make and sell digital televisions that comply with the FCC's standards. First, the FCC adopted the ATSC standard without any information regarding the number of separate patent licenses manufacturers would be required to obtain or the prices that would be charged for those patents. This decision proved particularly unfortunate, because the FCC also adopted a broad standard that included far more specifications than are required to assure basic operational compatibility, and it has subsequently added more specifications to its rules. Second, the FCC chose to rely on *ad hoc* enforcement to curb the abuses some commenters warned were certain to occur, rather than adopt basic procedural protections that would prevent abuses from occurring in the first place.

The first digital television sets sold in the late 1990s after the FCC adopted the ATSC standard were priced well over $10,000 and were little more than trade show exhibits and toys for the affluent. Nobody was *required* to purchase a digital television set to continue watching television. It could be argued that a per-set royalty of $5 or $10 paid to a single ATSC patent holder may have been reasonable in the context of the times and that a policy of *ad hoc* enforcement of abuses was sufficient to protect the public. But conditions today could hardly be more different, and the FCC's 1996 policy of *ad hoc* enforcement to prevent DTV price gouging by patent holders is now hopelessly inadequate.

Today it is illegal to sell a new television that does not comply with the Commission's chosen DTV standard, and by Congressional mandate tens of millions of analog televisions will be obsolete in just a few weeks. Research shows that price is far and away the most important factor considered by consumers purchasing flat screen

televisions.[3] Yet nobody, including the FCC, knows exactly what proprietary technology is included in the FCC-mandated standard, who owns it, or how much all of the patent holders are demanding Americans pay as royalties. Several parties have alerted the FCC to potential abuses, but the FCC has so far failed to investigate and take appropriate action within the existing regulatory framework.

The DTV patent licensing process is completely broken, and Americans are paying the price. U.S. consumers purchase more than 62,000 digital televisions every day[4] and are being asked to pay well over ***one million dollars every day*** in excessive fees to DTV patent holders for the alleged "essential" patents alone. The cost of comparable DTV patent rights in Europe or Japan would be about $62,000.

CUT FATT urges the FCC to take two simple steps to begin curbing abuses by those claiming exclusive rights to license FCC-mandated technologies. First, the FCC should declare that DTV royalty demands for claimed "essential" patents that exceed international comparables are presumed to violate the FCC's RAND requirements. Patent holders that demand fees higher than international comparables should have the burden of proving that those fees are reasonable and nondiscriminatory, and the FCC should state its intention to impose forfeitures on parties that cannot do so. This should dissuade DTV patent holders from demanding excessive royalty fees they cannot justify

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[3] *See Price Matters Most to Flat-Screen Buyers*, TVWeek, April 3, 2008, available at http://www.tvweek.com/news/2008/04/price_matters_most_to_flatscre.php ("About 84% of recent buyers of flat-screen TVs . . . said price was a major factor in their purchase choice.").

[4] The Consumer Electronics Association estimates U.S. sales of digital televisions and displays was 27,831,000 in 2008 and predicts sales of 29,058,000 units in 2009. The great majority of these units, including all of the 45 million HDTVs sold in the two year period, will include ATSC tuners. *See* the Consumer Electronics Association's *U.S. Consumer Electronics Sales & Forecasts 2004-2009,* published July, 2008, at page 15. In addition, tens of millions of NTIA-subsidized DTV converter boxes include the same ATSC tuners that are subject to the extraordinary patent royalty demands discussed in this petition.

by objective measures, while permitting those who believe they can justify high fees the opportunity to do so.

Second, the FCC should initiate a rulemaking proceeding to adopt "light touch" regulatory procedures to protect consumers from DTV royalty extortion. Specifically, the FCC should require "essential" patent holders – parties claiming to hold patents that are needed to implement FCC-mandated standards – to declare their patents and make best efforts to form a license pool. The FCC should review the terms offered by any such pool for compliance with the FCC's existing RAND standard. This simple, two-step process relies primarily on market forces guided by a clear statement that licensors demanding excessively high fees bear the burden of proving Americans are getting a fair deal.

I. BACKGROUND

Early in the process of selecting a digital television standard, the FCC recognized that widespread licensing of the necessary technologies on reasonable terms would be crucial to the success of "Advanced Television" ("ATV"). The Commission stated its belief that "in order to generate the volume of equipment necessary for ATV service to develop widely, the patents on any winning ATV system [must] be licensed to other manufacturing companies on reasonable terms" and acknowledged "some divergence of opinion as to the degree to which regulation is required, either now or at some future point, to ensure that reasonable patent licensing policies are indeed adopted."[5]

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[5] *In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Second Report and Order/Further Notice of Proposed Rulemaking, 7 FCC Rcd. 3340, ¶ 68 (1992). Ironically, in that proceeding Zenith Electronics advocated regulation of patent licensing that would favor firms using domestically-made ATV components. A few years later Zenith was acquired by Korea's LG Electronics, which promptly closed Zenith's U.S. factories, but a dozen years later Zenith is still demanding exorbitant royalties for every television set sold in America. *See* Exhibit 1, *LG's U.S. Subsidiary Proves Golden Goose After All* (quoting a senior LG executive boasting of LG's "handsome

In May of 1996 the FCC proposed to adopt the Advanced Television Systems Committee ("ATSC") A/53 draft specification as the mandatory standard for digital television broadcasts.[6] The *Fifth Further Notice* included an extensive discussion of the advantages and disadvantages of adoption of mandatory standards.[7] The Commission acknowledged that required standards can impair competition:

> Required standards also may reduce some forms of competition while enhancing others. With required standards, equipment manufacturers cannot compete by offering differentiated products using different technologies. Required standards preclude this form of competition. As such, a primary cost of required standards is loss of variety.[8]

The Commission also asked whether American National Standards Institute patent licensing standards alone would be adequate to protect consumers:

> [I]n order for DTV implementation to be fully realized, the patents on a DTV standard [must] be licensed to other manufacturing companies on reasonable and nondiscriminatory terms. In response, the Advisory Committee's testing procedures have required proponents of any DTV system to follow American National Standards Institute patent policies which require assurance that: (1) a license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard; or (2) a license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination. While we believe that adherence to the patent policies of the American National Standards Institute will enhance competition and protect consumers, we seek comment on whether we should require more detailed information on the specific terms, if any, for patenting and licensing the ATSC DTV Standard. We note that the patent policies of the American National Standards Institute do not cover pending patents. How will pending patents be licensed? Are there any intellectual

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profits" based on its "VSB technology which is essential for making digital TVs in North America." Zenith is reported to be demanding $5 per television for its ATSC patents alone.

[6] *See In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service,* Fifth Further Notice of Proposed Rule Making, 11 FCC Rcd. 6235 (1996) ("*Fifth Further Notice*").

[7] *Id.* at ¶¶ 21-48.

[8] *Id.* at ¶ 35.

> property, patenting, or licensing concerns we are not aware of which need further consideration?[9]

On December 24, 1996, the FCC adopted the major elements of A/53, establishing it as the exclusive method for transmission of digital broadcast television signals in the United States.[10] Citing the commitments by proponents of the ATSC standard "to make any relevant patents that they owned available either free of charge or on a reasonable, nondiscriminatory basis" the Commission declined to adopt specific regulations to ensure that consumers were protected.[11] The Commission instead chose to rely on enforcement to ensure that patent holders do not abuse their status:

> It appears that licensing of the patents for DTV technology will not be an impediment to the development and deployment of DTV products for broadcasters and consumers. We reiterate that adoption of this standard is premised on reasonable and nondiscriminatory licensing of relevant patents, but believe that greater regulatory involvement is not necessary at this time. We remain committed to this principle and if a future problem is brought to our attention, we will consider it and take appropriate action.[12]

No party, including the original proponents of the standard, challenged the FCC's jurisdiction to enforce reasonable and non-discriminatory licensing of "essential" patents.[13] The FCC has since incorporated by reference other ATSC standards, requiring all broadcasters and television set manufacturers to comply with those standards (and often to obtain additional patent licenses) as well.[14]

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[9] *Id.* at ¶ 67.

[10] *See In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fourth Report and Order, 11 FCC Rcd. 17771 (1996) ("*Fourth Report and Order*").

[11] *Id.* at ¶ 54.

[12] *Id.* at ¶ 55.

[13] The members of the HDTV Grand Alliance were AT&T, General Instrument Corporation, Massachusetts Institute of Technology, Philips Electronics North America Corporation, Thomson Consumer Electronics, The David Sarnoff Research Center, and Zenith Electronics Corporation. *Id.* at fn. 10.

[14] For example, in 2004 the FCC mandated that broadcasters and television receiver manufacturers implement ATSC standard A/65B, Program and System Information Protocol ("PSIP"). *See In the*

II. DISCUSSION

A. The FCC has turned a blind eye to a DTV patent licensing process that is hopelessly out of control; parties demanding astronomical fees are accountable to no one.

One might reasonably expect that when a regulatory agency imposes mandatory standards that force Americans to pay royalties on hundreds of millions of devices, the agency would have some sense of who is demanding those royalties, who is collecting those royalties, what consumers are getting for their money, and how much they are being made to pay. One might also reasonably expect that a manufacturer wishing to implement a government-mandated standard in order to sell digital televisions could easily identify all necessary patent rights and obtain them quickly on fair and reasonable terms with a minimum of hassle. The FCC has acknowledged that before adopting mandatory technical standards it should at least "conduct a sufficient evaluation of the underlying patent rights to prevent any monopoly rights granted under the patent process from being unnecessarily extended through standardization."[15] As the Commission wrote in connection with implementation of the broadcast flag rules, "no mandatory standard should be so dependent on specific patent rights that the cost of that technology to the public would be adversely affected."[16]

Yet the FCC adopted the bloated ATSC standard without imposing any disclosure requirements or any accountability rules on patent holders, creating precisely the conditions it sought to avoid and allowing those conditions to fester out of control. By the FCC's own estimate, made this year in response to questions from Senator John

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Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order 19 FCC Rcd. 18279 (2004).

[15] *Digital Output Protection Technology and Recording Method Certifications*, Order, 19 FCC Rcd. 15876, ¶ 90 (2004).

[16] *Id.*

Kerry, implementation of the ATSC standard relies on perhaps thousands of claims in hundreds of patents held by at least seventeen different entities.[17] Any single claimant can freely demand any license fee it wants, and can sue to block manufacturers who refuse to pay outlandish fees from selling digital television sets to consumers altogether. The FCC does not know what license terms ATSC patent holders demand or how much consumers ultimately pay for the DTV standard the FCC chose.[18] Manufacturers face multiple, successive rounds of exorbitant fee demands followed by multiple rounds of litigation. Compared to conditions for DTV patent licensing elsewhere in the world, licensors in the United States operate freely in a lawless "Wild West" without supervision or accountability. Common licensing practices that drive up consumer costs and diminish competition are:

- Tying – requiring a manufacturer to purchase additional, unnecessary licenses in order to obtain rights to an "essential" patent.
- Litigation to eliminate competition – filing suit to obtain injunctive relief (as opposed to damages) against competing manufacturers who have declared a willingness to license on fair, reasonable and non-discriminatory terms and conditions.
- Retributive discrimination – imposing special, punitive rates or conditions on manufacturers that refuse to accede to unreasonable fee demands.
- Accretive disaggregation – selling one or more essential patents without reducing the price of the portfolio, thereby enabling another claimant to demand monopoly rents.
- Licensing through litigation – filing lawsuits claiming exorbitant infringement damages to coerce settlement at unreasonable rates.

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[17] Following an April 8, 2008 Senate Commerce Committee hearing on the DTV transition, Senator John Kerry submitted questions for the record to FCC Chairman Kevin Martin pertaining to licensing practices of ATSC patent holders. The version of the response obtained by CUT FATT is undated, but document metadata indicates it was created on May 9, 2008. A copy is attached as Exhibit 2.

[18] *Id.*

- Nondisclosure – refusing to identify precisely what rights are being offered in exchange for demanded fees.
- Confidential demands – refusing to disclose licensing terms except subject to a signed confidentiality agreement.

U.S. consumers pay the high cost of these practices while their government, which adopted the standard, allows these tactics to flourish. Consumers in other parts of the world do not pay costs or suffer competitive harm from such practices. In contrast to DTV standards used elsewhere, ATSC patent holders by and large have refused to form a meaningful patent pool, instead preferring to subject manufacturers to multiple, successive, additive demands. This "stacking" drives the cost of ATSC patent licenses to astronomical levels, since no one adjudicates a fair price for the entire basket of rights and there is no cap forcing licenses to agree on the relative value of their individual portfolios. The combined demands of just a few prospective ATSC patent licensors total $20-30 per television,[19] and by the FCC's reckoning, at least seventeen parties claim to hold essential patents.[20]

In Japan and Europe, manufacturers of digital televisions can obtain licenses to most patents essential to implementation of the standards used there through established patent pools. Pool licenses are available to all manufacturers at the same fair and reasonable rates according to transparent, published terms. There is no uncertainty, no cause for endless litigation, and most importantly, there is no price gouging. Licenses for technology comparable to ATSC standards, which cost $20-$30 or more per unit for televisions sold in United States, cost about $1 per unit for televisions sold in Europe

[19] *See*, e.g., *TV makers to fight royalties held by foreign patentee,* December 27, 2006, available at http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=41632&col_no=927&dir=200612 (patent holders with the US standard of Advanced Television System Committee (ATSC) asked for more than $20 in royalties on each TV set).

[20] *See* Exhibit 2.

(which has adopted the DVB-T standard) and Japan (which has adopted the ISDB standard).

There is nothing special about the European and Japanese digital television patent pools – it is the United States' complete lack of a licensing framework that is extraordinary. Pool licenses are available for many technologies sanctioned by standards organizations worldwide, whether or not a government has mandated use of such standards. The table below illustrates comparable "technology" licenses and takes an agnostic approach to whether there is a single patent owner/licensor or a group of licensors. Aside from MPEG-2, which is essential to implementing the ATSC standard, none of the license comparables identified here were government-mandated technologies that a manufacturer was required to include in order to lawfully sell products.

TECHNOLOGY COMPARABLES FOR ATSC

Technology	Royalty
MPEG-2	$2.50/unit
DVB-T pool license (DTV in Europe)	€0.75/unit (approx. $1/unit)
ISDB pool license (DTV in Japan)	¥100/unit (approx. $1/unit)
DVB-S2	$1.00/unit (fewer than 500,000 units) $0.50/unit (more than 500,000 units)
Zenith Tuning Patents	$1.00/unit
Bluetooth	Royalty-free
OpenCable	$1.50/unit
MPEG-4	- First 50,000 units – no royalty - Units in excess of 50,000, $0.25/unit with cap of $1 million/year
IEEE1394/FireWire	$0.25/unit
DVB-MHP	Royalty free after one-time membership fee

Based on currently available information, the stacking effect of known ATSC licensors, in which each licensor charges monopoly rates without giving any consideration to the total cost of implementing the ATSC standard, raises the production cost of digital televisions by $20-30 per unit, and the retail price Americans ultimately pay for these royalties can be even higher. These costs are far in excess of royalty fees for comparable technologies, and without FCC oversight prices could climb even higher: manufacturers of sets complying with the FCC's DTV standard receive new demands from aspiring collectors of ATSC patent royalties on a regular basis.

MPEG LA established an ATSC licensing pool in September 2007, but so far most of the parties making the most extravagant royalty demands have not joined the pool.[21] Setting aside concerns that the pool does not include patents of a number of entities that claim to hold essential patents (e.g., Thomson and Sony), the pool is seeking a royalty approximately ***five times higher*** than those sought for far more comprehensive DTV pools offered in Europe and Japan. The table below compares pool rates for DVB-T in Europe, ISDB in Japan and ATSC in the U.S.

INTERNATIONAL COMPARABLES FOR DTV

Patent Pool Administrator	DTV Technology Licensed	Royalty
MPEG-LA (United States)	ATSC	$5/unit
SISVEL (Europe)	DVB-T	€0.75/unit (approx. $1/unit)
ULDAGE (Japan)	ISDB	¥100/unit (approx. $1/unit)

[21] *See* http://www.mpegla.com/atsc/.

This pricing disparity should be of great concern to the government agency that promised to take appropriate action against unreasonable and discriminatory licensing practices when it made the ATSC standard mandatory.

B. The FCC should establish a market-based approach to ensure essential patents are easily obtained and reasonably priced by international and industry standards.

CUT FATT asks the FCC to take two modest steps that should impose a measure of discipline on abusive claimants while establishing a long term market-based approach to licensing patents that are needed to comply with the FCC's DTV requirements. These steps should help ensure that Americans are treated fairly by parties claiming to hold exclusive rights in government-mandated technology.

First, the FCC should immediately declare that:

(i) royalty demands for patents essential to implementation of mandatory DTV standards are rebuttably presumed to violate the FCC's RAND requirements if they exceed international or industry comparables by more than fifty percent.

(ii) any party claiming to hold "essential" patents has the burden of proving both essentiality and that its licensing terms comply with the FCC's RAND requirements;

(iii) a party holding an "essential" DTV patent that refuses to disclose publicly the terms of all licenses for that patent will be rebuttably presumed to discriminate among licensees;

(iv) the FCC will assess a forfeiture of at least $250 for each television or DTV receiving device sold in the United States and against which a holder of one or more essential ATSC patents collects or attempts to collect royalties on terms that are either unreasonable or discriminatory;

(v) the FCC will assess a fine of $11,000 for each set blocked from import or sale if the blocking party has refused to license an essential DTV patent to the excluded manufacturers on reasonable and nondiscriminatory terms.

These declarations would impact only parties that claim to hold patents essential to implementation of FCC-mandated DTV receiver standards, and would not require any party to change licensing demands that are reasonable, non-discriminatory and freely disclosed. Parties using FCC standards to extort excessive fees from consumers would have the benefit of a clear forfeiture metric to help them honestly assess whether their technology is really worth far more than market rates.

The Commission has clear authority to enforce its RAND licensing order. Under Section 503(b)(1)(B) of the Communications Act, as amended, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.[22] Under Section 1.80(b)(3) of the Commission's rules, the Commission may assess an entity that is neither a common carrier, broadcast licensee or cable operator a forfeiture of up to $16,000 for each violation or each day of a continuing violation, up to a maximum forfeiture of $112,500 for any single continuing violation.[23] In exercising such authority, the Commission must take into account "the nature, circumstances, extent, and gravity of the violation and, with

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[22] *See* 47 U.S.C. §503(b)(1)(B).

[23] *See* 47 C.F.R. §1.80(b)(3).

respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[24]

Neither the Commission's *Forfeiture Policy Statement*[25] nor Section 1.80 of the Rules establishes a specific base forfeiture for violation of the RAND licensing requirements. The Commission therefore has wide discretion in assessing an appropriate forfeiture as circumstances demand.[26] In connection with other DTV transition-related violations the FCC has assessed fines on a per-unit-shipped basis.[27] In *Syntax-Brillian* the Commission assessed a tiered forfeiture of up to $250 per unit, emphasizing "the gravity with which we view this violation and our desire that the proposed forfeitures have a strong deterrent effect."[28]

The callous price gouging of American consumers disclosed in this petition and in other matters that have been brought to the attention of the Commission by other parties are willful and far more egregious violations than operational errors leading to sale of noncompliant sets. CUT FATT proposes that the Commission assess a forfeiture of at least $250 for each television or ATSC receiving device sold in the United States and against which a holder of one or more essential ATSC patents collects or attempts to

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[24] 47 U.S.C. 503(b)(2)(E). *See also* 47 C.F.R. §1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

[25] 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. §1.80.

[26] *See* 47 C.F.R. §1.80(b)(4), Note to paragraph (b)(4) ("The Commission and its staff *may* use these guidelines in particular cases [and] its staff *retain the discretion* to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (emphasis added).

[27] *See, e.g., Syntax-Brillian Corporation*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 10530, ¶ 15 (2007); *see also In the Matter of Polaroid Corporation*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 6346 (2008) (while failing to assess a per-unit forfeiture noting that "each time a digital television receiver that lacks the ability to adapt to a new rating system is shipped interstate constitutes a separate violation subject to forfeiture").

[28] *Id.*

collect a royalty on prices or terms that are either unreasonable or discriminatory. The proposed forfeitures are consistent with fines the FCC has previously assessed for violations of its DTV tuner and analog labeling rules,[29] and the FCC could impose these forfeitures without any advance declaration. Simply by declaring that it will treat RAND licensing violations in the same manner the FCC can impose a measure of sobriety on parties that may otherwise be tempted to continue overindulging in excessive royalty demands.

Second, simultaneously with the issuance of the declaratory ruling, the FCC should release a Notice of Proposed Rulemaking proposing adoption of "light touch" approach to licensing of "essential" patents that emphasizes disclosure and industry self-regulation. The Commission should require all parties claiming to hold patents that are essential to implementing the FCC's DTV requirements to identify those patents and state all terms on which those patents have been licensed within 30 days of the effective date of the rule. Those parties should be given an additional 90 days to attempt to form a patent pool and should be required to provide a detailed report of their efforts. If a pool is formed the Commission should review the pool's licensing terms (with the benefit of public comment) to determine whether they are reasonable and nondiscriminatory based on international comparables. The Commission should complete its review within 60 days, including the public comment period. If any patents deemed to be essential are excluded from the pool by their owners, the essentiality and licensing terms for those patents should be separately subjected to public comment and FCC review for reasonableness.

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[29] 47 CFR §15.117(k).

If the parties fail to form a meaningful pool, or if the pool itself demands rates that exceed international comparables, the Commission can and should directly regulate ATSC and other "essential" DTV technology royalty rates to ensure that Americans do not pay substantially more than consumers elsewhere for DTV patent rights. Patent holders voluntarily submitted to FCC oversight of their compliance with the FCC's RAND licensing order, and parties that abuse their status must be held accountable. However, experience in other countries (and even in the U.S. with respect to other consumer electronics standards) suggests that it may be possible to avoid direct regulation of royalty rates. A Commission-sanctioned patent pool is a "light touch" regulatory approach that assures the interests of American consumers are reasonably protected without requiring the FCC to engage in patent royalty rate setting. Members and administrators of the pool can assess the essentiality and relative value of each claimed patent, knowing that the total cost of the pool must be reasonable by objective, international, market-based standards.

Although CUT FATT believes this simple, two-step approach is the best way to protect consumers with the smallest regulatory footprint, the Commission may wish to consider other approaches. Any rules adopted[30] should advance four fundamental principles:

1. Full disclosure. Any party claiming to hold ATSC or other patents essential to implementation of the FCC's DTV rules should declare those patents to the FCC and disclose all terms on which its patents are made available to any party. Notably, the FCC already requires that any party offering patent licenses for digital television output control technology to

[30] Proposed rules are attached hereto as Annex A.

disclose licensing terms, and the FCC has not selected a single monopoly provider of that technology.[31]

2. Anti-stacking and objective reasonableness. All "essential" DTV patent holders should be required to consider the demands of all other "essential" patent holders in setting their own rates and terms, and the total of all demands must be reasonable by international standards. Patent demands that exceed comparables by more than 50% should be rebuttably presumed to violate the FCC's RAND standard.

3. *Per Se* Violations. Certain actions should be deemed to be *per se* violations of the reasonable and nondiscriminatory licensing rule. These include: (i) tying non-essential patents to essential ATSC patents, unless essential patents are also offered unbundled at a proportional discount to the bundled rate; (ii) offering or agreeing to any licensing terms and conditions that are subject to a confidentiality agreement, including through settlement of litigation; (iii) discriminatory pricing, including bilateral deals between licensors, for "essential" patents; (iv) litigation to obtain injunctive relief (as opposed to damages) against non-licensed users of essential patents who have declared a willingness to agree on fair, reasonable and non-discriminatory terms and conditions.

4. Periodic Review. If a comprehensive pool is not formed, all "essential" patent holders should be required to review their rates and terms at least once every 36 months and reduce rates if appropriate based on marketplace conditions, including declines in the average selling price of televisions.

This proposal is consistent with recommendations made in a paper submitted to American Bar Association Section of Antitrust law:

> If standards are essential for market access, and [intellectual property rights] IPRs are essential for compliance with the standards, then the licensors must avoid any of the following potentially abusive licensing practices:
>
> - **discriminating pricing** (including bilateral deals between licensors) for IPRs that are "essential" for compliance with the standard, thus distorting the level playing field in the downstream market;
>
> - **cross-subsidization** of activities in the downstream market, using royalties to gain a competitive advantage;

[31] A proponent of a specific digital output protection technology must provide a certification showing, *inter alia*, a general description of how the technology works and evidence demonstrating that the technology will be licensed on a reasonable, non-discriminatory basis. 47 C.F.R. § 73.9008(a).

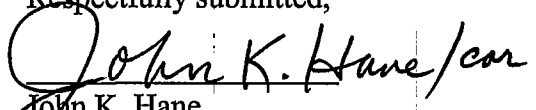
- **price squeezing** by imposition of royalty rates that do not leave an adequate margin for competitors;

- **excessive royalties** for the IPRs; **predatory pricing** in the downstream market, and **tying** of essential IPR to technology or products that are not essential to comply with the standard; and

- litigation to obtain **injunctive relief** (as opposed to damages) against non-licensed users of essential IPRs who have declared a willingness to agree on fair, reasonable and non-discriminatory terms and conditions, unless the user is in breach of the license agreement or not in good faith.[32]

CUT FATT respectfully requests that the Commission immediately issue a public notice seeking comment on this petition and promptly thereafter initiate a formal rulemaking proceeding to establish basic rules for licensing of patents essential to the implementation of FCC-mandated DTV receiver standards.

Respectfully submitted,



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2 January 2009

[32] *Standards for Standards*, Maurits Dolmans, Esq., Paper for American Bar Association, Section of Antitrust law, Spring meeting 2002, Session on Trade Associations, Washington DC, April 26, 2002, and for the Joint Department of Justice Antitrust Division/Federal Trade EC Commission hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, Session on Comparative Law Topics: Licensing of Intellectual Property in Other Jurisdictions, Washington DC, May 22, 2002 (available at http://www.ftc.gov/opp/intellect/020522dolmans.pdf).

Annex A – Proposed Rules

The following new section to Part 73 is added, immediately after § 73.9009, to read as follows:

§ 73.9010 ATSC Patent Terms and Disclosure Requirements

(a) Any party claiming to hold patent rights that are necessary to comply with FCC digital television receiver requirements ("essential patents") must make such patents available either for free or on a reasonable and nondiscriminatory basis to all television manufacturers. Essential patent holders must consider the demands of all other essential patent holders when setting rates and terms, and the total of all demands of all essential patent holders must be reasonable by international standards.

(b) Any party claiming to hold essential patents must:

(1) Report to the FCC within 30 days of the effective date of this provision, and annually thereafter: (i) all patents such party claims to be essential, along with an explanation as to why such patents are essential; (ii) all terms on which essential patents are offered for license; and (iii) all terms on which essential patents have been licensed to any party.

(2) Review licensing terms for essential patents at least once every 36 months, make any adjustments that are appropriate based on marketplace conditions, and certify to the FCC that such review and any adjustments have been made.

(c) All parties claiming to hold essential patents pursuant to the requirements of paragraph (b)(1) above must:

(1) within 120 days of the effective date of this provision, make and conclude good faith efforts to (i) reach a consensus determination of which patents are necessary to comply with FCC digital television receiver requirements and (ii) form a pool and offer a pool license covering all patents contributed to such pool; and

(2) no more than 120 days after the effective date of this provision, provide a full written report to the FCC that includes (i) a summary of such party's good faith efforts undertaken pursuant to paragraph (c)(1) above; (ii) a certification that such party's licensing terms for essential patents are reasonable and nondiscriminatory, and (iii) a detailed explanation of the basis for such party's certification. Any party that has contributed all of its essential patents to a pool formed pursuant to paragraph (c)(1) may sign a joint report and certification by all pool contributors. Any such joint report shall include a list of patents deemed essential that are included in the pool, a list of all patents deemed

essential that were not contributed to the pool, and a copy of all terms and conditions on which pool licenses will be offered.

(d) The Commission will place all reports submitted pursuant to paragraph (c)(2) on public notice and invite comments as to whether the terms and conditions of any licenses offered meet the requirements of this section.

(e) Any party, including any patent pool, that seeks royalty payments for essential patents that exceed rates for comparable technologies has the burden of proving that such rates are reasonable and nondiscriminatory.

(f) The following practices are deemed to be *per se* violations of reasonable and nondiscriminatory licensing requirements:

(1) tying non-essential patents to essential patents, unless essential patents are also offered unbundled at a proportional discount to the bundled rate;

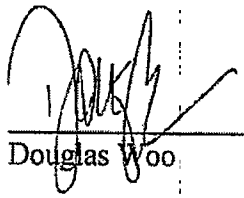
(2) offering or agreeing to any licensing terms and conditions for essential patents that are subject to a confidentiality agreement, including through settlement of litigation;

(3) discriminatory pricing, including bilateral deals between licensors, for essential patents; and

(4) litigation to obtain injunctive relief (as opposed to damages) against non-licensed users of essential patents who have declared a willingness to obtain licenses on fair, reasonable and non-discriminatory terms and conditions.

DECLARATION

I, Douglas Woo, declare under penalty of perjury that I have read the foregoing "Petition for Rulemaking and Request for Declaratory Ruling". The information set forth therein was collected by others, and such information is not necessarily within my personal knowledge. However, on behalf of the Coalition United to Terminate Financial Abuses of the Television Transition LLC, I affirm that the facts included therein are true and correct to the best of my information and belief, except for those facts based on official records or other documents of which the FCC may take official notice, or those for which other support is provided.



Douglas Woo

Executed on January 2, 2009

Exhibit 1

LG's U.S. Subsidiary Proves Golden Goose After All

LG Electronic's U.S. subsidiary Zenith, which has been held up as an example of a failed takeover for a decade, is now earning handsome profits for its parent company in Korea. In 1995, LG Electronics acquired the TV maker for US$500 million to advance into the North American market. But Zenith initially proved a drag for LG because the electronic manufacturer went into the red, losing out in competition with Japanese firms.

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Now the tide has turned. According to a senior LG Electronics executive, Zenith is now making handsome profits on the back of the digital TV boom in North America. Zenith owns a source technology dubbed VSB which is essential for making digital TVs in North America, and manufacturers must pay US$5 per TV to Zenith for using the technology.

Sales of digital TV are growing rapidly in North America after the U.S. government made it mandatory for TV stations to broadcast digitally from the year 2009. Zenith recorded $25 million in sales last year, and the figure doubled to $50 million this year without requiring any further investment. "Zenith has earned almost no profit over the last several years," LG said. "But now it is generating large profits. It's like ugly duckling turned into a golden goose." The digital TV market is expected to grow over 30 percent next year, making Zenith's upward march pretty much unstoppable. LG says Zenith will contribute to enhancing the brand value of LG TVs because of its source technology.

(englishnews@chosun.com)

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Exhibit 2

Questions for the Record from Senator Kerry to the Honorable Kevin Martin

1. Mr. Chairman, the digital transition is helping to increase the sales of digital televisions. It is estimated that 45 million sets will be sold in 2008-2009. It is important that the manufacturers of these sets know what IP they need, who owns it, and that the licensing terms are transparent. In order to ensure a free and open market, manufacturers need these facts. Therefore, please provide the Committee with information as to which patents are essential for manufacturers to make and sell ATSC televisions in the United States. Who owns the patents essential for manufacturers to make and sell ATSC televisions in the United States and what are the licensing terms for all manufacturers?

Response:

The Commission does not maintain a list of patents on the numerous technologies used in the Advanced Television Systems Committee (ATSC) standard, nor is there a single private compendium that lists those patents or the holders of rights to those patents. Rather, manufacturers developing products for operation under the ATSC standard must identify relevant patents and those holding patent rights by conducting patent searches in the same manner as for any other technology. The Commission's staff has, however, obtained information from the ATSC, the Consumer Electronics Association (CEA), Commission decision documents, *ex parte* presentations by parties opposing royalty payments, Internet searches and LG Electronics Company, Inc. to respond to the specific questions raised on this matter, as described below. We do not have complete information on the amounts actually charged for patent licenses because those licenses are business arrangements that are negotiated on a case-by-case basis; we do have some information, however, which is provided below.

There are at least 16 entities licensing patents that are essential to the manufacture of ATSC receivers. One of those entities, MPEG LA, provides a service that enables manufacturers to acquire essential patent rights from multiple patent holders in a single transaction, as an alternative to negotiating separate licenses. The MPEG LA "MPEG-2 portfolio" includes essential patents owned by 25 entities: Alcatel Lucent; British Telecommunications plc; Canon, Inc.; CIF Licensing, LLC; Columbia University; France Télécom; Fujitsu; General Instrument Corp.; GE Technology Development, Inc.; Hitachi, Ltd. (Hitachi); KDDI Corporation (KDDI); Koninklijke Philips Electronics N.V. (Philips); LG Electronics Inc. (LG); Matsushita Electric Industrial Co., Ltd. (Panasonic); Mitsubishi Electric Corporation (Mitsubishi); Nippon Telegraph and Telephone Corporation (NTT); Robert Bosch GmbH; Samsung Electronics Co., Ltd. (Samsung); Sanyo Electric Co., Ltd. (Sanyo); Scientific-Atlanta, Inc. (Scientific-Atlanta); Sharp Corporation (Sharp); Sony Corporation (Sony); Thomson Licensing; Toshiba Corporation (Toshiba); and Victor Company of Japan, Limited (JVC). Royalties for the MPEG-2 portfolio of video encoding/decoding patents are $2.50/unit.

MPEG LA also manages another portfolio of 32 patents specific to the ATSC standard for seven entities: LG, Panasonic, Mitsubishi, Philips, Samsung, Scientific-Atlanta, Inc., and Zenith Electronics LLC (parent company LG Electronics, Inc.). Zenith had

previously licensed separately a number of its patents for the 8-VSB transmission system used in the ATSC system. It recently indicated to us that it now licenses those patents through MPEG LA ATSC also, so that all of its ATSC patents are licensed through that entity. The royalty on the MPEG LA "ATSC portfolio" is $5.00/unit (this is in addition to the royalty for the MPEG-2 portfolio). Information on the MPEG LA patent portfolios, patent holders, patent numbers, and licensing terms is available at http://www.mpegla.com (*see* http://www.mpegla.com/atsc/atsc-agreement.cfm.

Dolby Laboratories, Inc. (Dolby) holds the patent for the AC-3 digital audio technology used in the ATSC standard. Information on the Dolby AC-3 patent, including the patent number and patent numbers of related technologies, is available at http://www.freepatentsonline.com/7283965.html. We do not have confirmed information on the licensing terms or rates for the Dolby AC-3 patent. In addition, Tri-Vision Electronics Inc. (Tri-Vision) holds the rights to the patent for the ATSC v-chip parental control program blocking technology. General information on the Tri-Vision and the vchip technology is available at http://www.tri-vision.ca. A document with the Tri-Vision v-chip patent number is attached; we do not have confirmed information on the licensing terms or rates for the Tri-Vision v-chip patent. Funai (brand names Emerson, Philco, Symphonic, and Magnavox) holds one ATSC patent (U.S. Patent No. 6924848) that it acquired from Thomson/RCA and licenses separately. Information on the Funai patent is available at http://www.freepatentsonline.com/6924848.html. We do not have confirmed information on the licensing terms or rates for the Funai patent.

U.S. patent numbers and additional information for the above technologies are provided in materials that are attached separately. Copies of the information available on the websites discussed above and other materials also are attached (***See Appendix A***). There also may be additional patents for technologies used in the ATSC standard that are not included in the above sources.

At least one of the entities holding the original rights to an ATSC patent subsequently transferred its rights. AT&T sold U.S. Patent No. 5,243,627 to Rembrandt Technologies, L.P. (Rembrandt), a patent holding company. We do not have specific information on Rembrandt's licensing terms or rates for this patent. However, the Harris Corporation (Harris) claims that Rembrandt is seeking very high rates.

2. Mr. Chairman, it is also critical to ensure the American consumer is not paying too much for their digital television sets. A way to ensure our consumers are paying the appropriate price is to compare what it costs for patent licenses in Europe and Japan versus here in the United States. What digital broadcast television standards have been adopted in Europe and Japan? What patent licenses are needed to build televisions using those standards? Who owns those patents and what are the terms of licensing? Is the total cost of patents needed to build digital televisions for US citizens higher than the total cost of patents needed to build televisions for sale in Europe and Japan?

Response:

Japan and Europe have adopted digital broadcast television standards that are different from the ATSC standard. Japan has adopted the "Integrated Services Digital Broadcasting-Terrestrial" (ISDB-T) standard for its broadcast DTV service. This standard was developed by the Association of Radio Industries and Businesses, a Japanese standards-making body. The Internet newsletter "EE Times Asia" (http://www.eetasia.com/ART_8800452486_480700_NT_d776b8f3.HTM) states that Mitsubishi, Panasonic, and Sony have established Uldage Inc. (Uldage) to provide a onestop patent-licensing program for DTV receivers in Japan; however, we have not been able to obtain the specific Japanese patents covered by Uldage. Under this program, manufacturers and distributors of digital broadcasting devices can license major patents for ISDB-T DTV receivers at a relatively low cost. Thus far, the Uldage program includes patents owned by France Télécom, Hitachi, Japan Broadcasting Corporation, JVC, Mitsubishi, Panasonic, Sanyo, Sharp, Sony, Telediffusion de France, and Toshiba. Uldage has also indicated that its program does not yet include all of the relevant patents and that it will continue inviting participants to achieve full coverage.

It is important to note that the Uldage program includes only a portion of the patents needed for operation of the ISDB-T standard; in particular it does not include patents for the MPEG-2 video and audio technologies that ISDB-T uses. As noted in the response to Question 1 above, those patents are licensed by MPEG LA, with a $2.50 royalty for the MPEG-2 portfolio; however, we have not been able to determine whether this royalty is collected for products sold outside the United States. As indicated by EE Times Asia, there may also be essential patents for other technologies used in the ISDB-T standard that are not included in either the Uldage or MPEG LA portfolios.

Europe has adopted the "Digital Video Broadcasting – Terrestrial" (DVB-T) standard for its broadcast digital television service. The patents for this standard are managed by MPEG LA and the royalty for this "DVB-T portfolio" is 0.75 Euros/unit (at current exchange rates, about $1.20/unit). The DVB-T portfolio includes essential patents owned by France Télécom, JVC, and Panasonic. However, licenses for the essential patents for the MPEG-2 technology used in the DVB-T standard, *i.e.*, the MPEG-2 portfolio, are not included in the license for the DVB-T portfolio. The royalties for those patents are an additional $2.50 per unit (see e-mail message from Larry Horn of MPEG LA in

Appendix A responding to an inquiry on this point). Information on the MPEG-2 and DBV-T patent portfolios, patent holders, patent numbers, and licensing terms is available at http://www.mpegla.com (*see* http://www.mpegla.com/m2/m2-agreement.cfm for the DVB-T license agreement).

3. Mr. Chairman, when the ATSC standard was adopted in 1996 the FCC said that the relevant patents must be made available free of charge or on a reasonable, nondiscriminatory basis. Manufacturers reportedly pay more than $20 per television set for ATSC patent royalties. By comparison, consumers in Japan pay 82 cents per set, and consumers in Europe pay less than $1 per set for comparable digital standards. Do ATSC royalties of more than $20 per set meet the FCC standard for reasonableness? What can the FCC do to address this disparity? What, if anything, has been done or is under consideration?

Response:

The ATSC requires that participants with essential patent claims to technologies used in the standard make their technologies available on a "reasonable and non-discriminatory" (RAND) basis. The ATSC also requires participants holding patent rights to sign a patent statement affirming this commitment. More information is available in the ATSC Patent Policy available on the ATSC website (http://www.atsc.org/policy_documents/B-4%20Patent%20Policy%2012-13-07.doc.) At least 17 ATSC participants assert ownership of essential patents which may amount to thousands of claims in hundreds of patents. The ATSC patent statements as signed by original patent holders are available at http://www.atsc.org/patentstatements.html. A copy of the ATSC patent policy and the ATSC patent statements submitted by patent holders from that website is attached ***(See Appendix B)***.

It is also important to note that only participants in the ATSC standards development process are covered by the ATSC patent policy. The identities and actions of other entities that may hold essential claims are not known at this time. Many of the original ATSC patent holders have sold or assigned their patent rights to other entities (see, for example, the list of patent holders participating in the MPEG LA portfolio, several of which are not included in those signing the original ATSC statements) ***(See Appendix A)***, but the requirement to adhere to the RAND commitment in the ATSC patent statements continues to apply to subsequent rights holders. In its 1996 decision adopting the ATSC standard as the U.S. DTV standard, the Commission stated that the standard is premised on the reasonable and non-discriminatory licensing of relevant patents. The Commission also concluded that greater regulatory involvement was not necessary at that time. The Commission indicated, however, that it remained committed to this principle and would take appropriate action if a future problem is brought to its attention. See, *Fourth Report and Order* in MM Docket No. 87-268, 11 FCC Rcd 17771 (1996).

No party has filed a formal complaint with the Commission regarding access to patents to produce digital televisions or digital-to-analog converter boxes. The Commission is aware of some issues regarding access to patent rights. Several parties have made

presentations to the Commission concerning the acquisition of one of the ATSC patents (U.S. patent No. 5,243,627) by Rembrandt Technologies, and the amount of the license fees that the company is requesting from TV networks and transmission equipment manufacturers. More recently, the "Coalition United to Terminate Financial Abuse of the Television Transition" has made informal presentations to the Commission asserting that high rates for ATSC patent royalties are increasing the price of DTV receivers. In addition, the Consumer Electronics Association has requested that the Commission clarify its rules with respect to DTV V-chip functionality based in part on concern that patent royalties demanded by Tri-Vision, a Canadian entity, would adversely affect the price of DTV receivers (see, Petition for Clarification and/or Reconsideration of the Commission's *Report and Order* in MB Docket No. 03-15).